OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-01-32 OF 1995
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
20 MARCH 1999

Land Law *— Indefeasibility of title and interests — Forged transfer — Whether chargee of land deriving title from forged transfer can enforce charge — Whether registrar had sufficient grounds to enter caveat — National Land Code 1965 s 340(2)(b) & (3)*

The appellant bank was the chargee of a plot of land in Batu Pahat, Johor ('the land'). The charge in favour of the appellant had been granted by one Ng See Chow in order to secure an overdraft facility from the appellant. When the said Ng See Chow failed to pay for the overdraft facility, the appellant applied for, and the court granted, an order for sale of the land. Complications arose when one Ng Kim Hwa lodged a police report claiming that the land belonged to him. He claimed that he had not executed any transfer form in favour of Ng See Chow in respect of the land. A registrar's caveat was entered agianst the land preventing its sale by the appellant. The appellant applied to have the caveat removed contending that their charge was indefeasible as they had no knowledge of the fraud. When the court refused the application, the appellant appealed.

Held, dismissing the appeal:

(1) As the appellant's interest as chargee over the land had been granted by Ng See Chow, whose title may have been acquired through a forged transfer and therefore liable to be defeated under s 340(2)(b) of the National Land Code 1965, the registrar had ample grounds to enter his caveat against the sale of the land (see pp 523I–524A).

(2) There is no protection afforded for the appellant eventhough it was an innocent purchaser for value as the proviso under s 340(3) of the National Land Code 1965 is not applicable to a situation arising under s 340(2)(b) of the Code (see p 524A–B).

[Bahasa Malaysia summary

Pihak bank iaitu perayu adalah pemegang gadaian sebidang tanah di Batu Pahat ('tanah tersebut'). Gadaian yang berpihak kepada perayu telah diberikan oleh Ng See Chow untuk menjamin suatu kemudahan overdraf daripada perayu. Apabila Ng See Chow tersebut gagal untuk membayar kemudahan overdraf tersebut, perayu telah memohon untuk, dan mahkamah telah membenarkan, suatu perintah penjualan tanah tersebut. Kerumitan timbul apabila Ng Kim Hwa telah membuat laporan polis dengan mendakwa bahawa tanah tersebut

adalah kepunyaannya. Dia mendakwa bahawa dia tidak melaksanakan sebarang borang pindah milik yang berpihak kepada Ng See Chow berkenaan tanah tersebut. Satu kaveat pendaftar telah dimasukkan terhadap tanah tersebut untuk menghalang penjualannya oleh perayu. Perayu telah memohon agar kaveat dialihkan dengan menegaskan bahawa gadaian mereka tidak boleh disangkal kerana mereka tiada pengetahuan tentang frod tersebut. Apabila mahkamah menolak permohonan tersebut, perayu telah merayu.

Diputuskan, menolak rayuan:

(1) Memandangkan kepentingan perayu sebagai penggadai tanah tersebut telah diberikan oleh Ng See Chow yang mempunyai hak milik yang diperolehi melalui suatu pindah milik frod dan oleh itu adalah terbuka untuk diketepikan di bawah s 340(2)(b) Kanun Tanah Negara 1965, pendaftar mempunyai alasan yang cukup untuk memasukkan kaveatnya terhadap penjualan tanah tersebut (lihat ms 523I–524A).

(2) Tiada perlindungan diberikan kepada perayu walaupun perayu adalah pembeli suci hati dengan balasan berharga kerana proviso di bawah s 340(2)(b) Kanun Tanah Negara 1965 tersebut tidak terpakai kepada situasi yang timbul di bawah s 340(2)(b) Kanun tersebut (lihat ms 524 A–B).]

Notes

For other cases on forged transfer, see 8 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1853–1854.

Cases referred to

Assets Co Ltd v Mere Roihi & Ors [1905] AC 176 (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)

Chiew Lip Seng v Perwira Habib Bank (M) Bhd [1999] 1 MLJ 310 (refd)

Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34 (refd)

Darry v Peek (1889) 14 App Cas 337 (refd)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196 (refd)

Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)

Frazer v Walker [1967] 1 AC 569 (refd)

Haji Junus v Chik & Anor [1964] MLJ 343 (refd)

Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491 (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)

Quah Hong Lian Neo v Seow Teong Teck & Ors [1936] MLJ 161 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 339
National Land Code 1965 ss 292, 304, 320(1)(a), 340, (1), (2), (2)(a), (2)(b), (3), (3)(a), (3)(b)

Appeal from: Originating Motion No 25–16 of 1993 (High Court, Melaka)

Lee Wooi Mien (*Shook Lin & Bok*) for the appellant.
Abdul Rasid bin Sudin (Assistant State Legal Adviser) for the respondent.

NH Chan JCA: I have had the advantage of reading the judgment in draft of my lord Mokhtar Sidin JCA and I also agree that the appeal should be dismissed. The facts are as stated in his judgment. I shall state below the law on the application of the defeasibility provisions of s 340(2)(a) and (b) of the National Land Code and the manner in which it is applied to the facts of the instant appeal.

The law

Section 340(1) and (2) of the National Land Code reads:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
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> (2) The title or interest of any such person or body shall not be indefeasible —
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any law.

It is plain that the words of sub-s (2) are constructed in such a way as to make defeasible only the registered title or interest of the immediate acquirer of the land or of an interest in the land (such as a charge or a lease). The subsection makes defeasible the registered title of a proprietor who gets onto the register by any of the means specified in s 340(2): see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 (CA) (at p 86A–B). It also makes defeasible the registered interest of a chargee who gets onto the register by any of the methods specified in sub-s (2): see *Chiew Lip Seng v Perwira Habib Bank (M) Bhd* [1999] 1 MLJ 310 (at p 317G).

Defeasibility on the ground of fraud under s 340(2)(a)

Under s 340(2)(a), the registered title of the proprietor or the registered interest of the chargee or lessee becomes defeasible where the registration was obtained by fraud or misrepresentation, and such proprietor, chargee or lessee was a party to or has colluded in the fraud.

The word 'misrepresentation' in the context of sub-s (2)(a), when read ejusdem generis can only mean fraudulent misrepresentation and not innocent misrepresentation (*Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196 (FC)). In *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 (PC) and *Haji Junus v Chik & Anor* [1964] MLJ 343, the fraud established was fraudulent misrepresentation. See Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia* (2nd Ed, 1995) at p 168. See further Sihombing: *The National Land Code, A Commentary* (2nd Ed, 1992) at pp 811–814.

Fraud in s 340(2)(a) means 'actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud': see *Assets Co Ltd v Mere Roihi & Ors* [1905] AC 176 at p 210 (PC). In other words, 'fraud' under paragraph (a) of this subsection is common law 'fraud', sometimes called *Darry v Peek* [(1889) 14 App Cas 337] 'fraud'. This is how Lord Lindley who delivered the judgment of the Board (Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley and Sir Arthur Wilson) in *Assets Co Ltd v Mere Roihi* put it, at p 210:

> Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sections 46, 119, 129 and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss 55, 56, 189 and 190) appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which *is forged or* has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon. (Emphasis added.)

The words which I have emphasised (in the judgment of Lord Lindley above) denote 'forgery' as within the meaning of 'fraud'. Where it is desired to rely on s 340(2)(a) as a means to invalidate a registered title or interest in a case of forgery, then forgery is to be treated as a species of fraud. In such a case, the person who presents for registration a document which is forged is not guilty of fraud under this subsection if he is not party or privy to the fraud. Subsection (2)(a) only applies if 'fraud' is used as a ground for invalidating a registered title or interest. *Assets Co Ltd v Mere Roihi* can only be applied to sub-s (2)(a). See also the Federal Court case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 which

considered, albeit obiter, s 340(2)(a) only. It never considered s 340(2)(b) at all, so that *Pekan Nenas* is not authority on para (b) of this subsection. See p 525, where Edgar Joseph Jr FCJ said:

> ... the Father and his faction could only succeed by establishing any one of the exceptions to indefeasibility provided under s 340(2) of the Code, the only relevant one being s 340(2)(a) of the Code, which provides that in any case of fraud to which the person or body was a party or privy, the title or interest of such a person or body shall not be indefeasible.

In *Pekan Nenas*, the appellant Pekan Nenas Industries Sdn Bhd had bought six pieces of land in Pontian, Johor from the Family Company although the transfers had not been registered yet. The Federal Court held that *Pekan Nenas* was entitled to rely on the rule in *Royal British Bank v Turquand* [1843–60] All ER 435 and allowed the appeal. In addition, the Federal Court also found for the alternative argument of *Pekan Nenas* that even if it was proved that it had knowledge of the family dispute between the members of the Family Company, knowledge alone of an adverse unregistered interest does not make the purchase and the registration impugnable under the Torrens system of land registration. This is how it was put by Edgar Joseph Jr FCJ, at p 529:

> We would, therefore, answer the question ... by saying that mere knowledge of the existence of an unregistered claim or interest in land may not amount to fraud unless it is demonstrated that there has been a deliberate and dishonest attempt to deprive the unregistered claimant of his claim or interest therein (see *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 (PC)).

With respect, although that may be so, but since the transfers have not been registered in the name of Pekan Nenas yet, the question of whether the registration was impugnable under s 340(2)(a) did not arise. This was because there were no registered titles of Pekan Nenas to call in question. In fact, the Federal Court did confirm that the registration had not taken place. This is the way in which it was put by Edgar Joseph Jr FCJ, at p 529:

> ... If this be the legal position had the transfers of the disputed properties been registered, then there is no reason in principle why if those transfers could not be registered because the disputed properties had been wrongly injuncted (sic), the legal position should be any different.

But the legal position is indeed different because s 340 deals only with the registered title or interest (such as a charge or a lease) in land. Section 340(1) deals with the indefeasibility of a registered title or interest in land and s 340(2) deals with the circumstances for which the registration of such title or interest becomes defeasible. In short, the apex court has expressed its opinion on a hypothetical question.

In any case, *Pekan Nenas* can never be authority on s 340(2)(b) because 'forgery' in sub-s (2)(b) is a separate ground by itself for invalidating a registered title or interest; see below, *Defeasibility on the ground of forgery under s 340(2)(b)*. So that, if 'forgery' is the ground for invalidating a registered title or interest, s 340(2)(b) is the provision to apply and not s 340(2)(a). If, on the other hand, fraud is the ground then s 340(2)(a) is the provision to apply but this will also attract the limitation that for a

registered title or interest to be vulnerable the proprietor (or his agents), chargee or lessee must be a party to or have colluded in the fraud. One has to choose between these two paras of sub-s (2) but it is a choice which will have different consequences.

Defeasibility on the ground of forgery under s 340(2)(b)

Under s 340(2)(b), the registered title of the proprietor or the registered charge or lease of the holder (such as the chargee or lessee) becomes defeasible where the registration was obtained by forgery.

In *Boonsom Boonyanit*, the registration of the transfer of the title of the property was obtained by forgery of the instrument of transfer and that made the registered title in the name of the transferee as proprietor defeasible under s 340(2)(b).

In *Chiew Lip Seng v Perwira Habib Bank (M) Bhd*, the registration of the charge was obtained by forgery of the charge instrument and that made the registered interest, namely, the charge, defeasible under s 340(2)(b).

Dr David Wong in *Tenure and Land Dealings in the Malay States*, at p 361, says:

> Forgery as a ground for vitiating a registered title, as set out in s 340(2)(b) of the Malaysian National Land Code, marks a focal point of difference between the Malaysian Torrens system and those where *Frazer v Walker* [1967] 1 AC 569 applies.

And at p 362, he goes on to say:

> It will be realised that 'forgery' under the Malaysian provision is a distinct ground on its own. The Singapore Land Titles Act (Cap 276), also expressly sets out 'forgery' as an exception to indefeasibility, but places 'forgery' side by side with 'fraud' subject to the same limitation, viz that for a registered title to be vulnerable in either case the proprietor (or his agent) must be a party to or have colluded in the 'fraud' or 'forgery'. This would appear to treat forgery as a species of fraud. Under the Malaysian provision, the very fact of forgery suffices by itself in making a registered title defeasible irrespective of the absence of knowledge or implication on the part of the proprietor. In other words, it affects the immediate proprietor even if he be an innocent purchaser for value.

In s 340(2)(b) there is no similar limitation as in s 340(2)(a) for the immediate proprietor, chargee or lessee to be party or privy to the 'forgery' before the registered title or interest becomes defeasible. In s 340(2)(b) the word 'forgery' is not to be equated with the word 'fraud. In other words, in the context of sub-s (2)(b) 'forgery' is not in the same category as 'fraud' and the limitation in s 340(2)(a) that for a registered title to be vulnerable, the immediate proprietor, chargee or lessee must be a party to or has colluded in the 'fraud' does not apply to 'forgery' in s 340(2)(b). In this country, under the provision of s 340(2)(b), the very fact of forgery suffices to make a registered title or interest (such as a charge or lease) defeasible irrespective of the absence of knowledge or implication of the immediate proprietor, chargee or lessee. In effect s 340(2)(b), to use the words of

Dr David Wong: 'affects the immediate proprietor [chargee or lessee] even if he be an innocent purchaser for value'.

The proviso to s 340(3)

It is important to note that the proviso to s 340(3) does not apply to s 340(2). It should be noted that the proviso to s 340(3) applies exclusively to those situations covered by s 340(3): see Teo Keang Sood and Khaw Lake Tee at fn 144 at p 191. In this respect the dictum of the Supreme Court in *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 at p 38 that this proviso applied to a s 340(2) situation is wrong. The observation was unnecessary to the decision since the Supreme Court had already held in that case that the registration of the transfer was defeasible for fraud under s 340(2)(a). This is what Syed Agil Barakbah SCJ said at p 38:

> ... We are satisfied that the transfer of the said Lot to her name was fraudulent and although she is the registered owner she cannot claim indefeasibility of title under s 340 of the National Land Code because of fraud under sub-s 2(a) to which she was privy. *Nor can she be termed as a purchaser in good faith and for valuable consideration under the proviso of the section in order to protect her title or interest.* ... (Emphasis added.)

The judge was mistaken (for his views in the sentence which I have highlighted in italics in the above passage). He seemed to think that the proviso to s 340(3) also applied to a s 340(2) situation. In reality s 340(2)(a) and (b) affect the immediate proprietor, chargee or lessee even if he be, in the case of sub-s (2)(a) a purchaser for valuable consideration, and, in the case of sub-s (2)(b) an innocent purchaser for value. See *Boonsom Boonyanit* per Gopal Sri Ram JCA at p 86:

> In our judgment, the learned judge was wrong in applying the decision of the Privy Council in *Frazer v Walker* [1967] 1 AC 569 to support the conclusion that under the Code, an acquirer of land who places himself upon the register by means of a forged document obtains an immediately indefeasible title if he is a bona fide purchaser for value.

In *Boonsom Boonyanit* the registration of the transfer of the title of the property was obtained by forgery of the instrument of transfer and that made the registered title in the name of the transferee as proprietor defeasible under s 340(2)(b). Where, however, the registered title of a proprietor whose title is defeasible is subsequently transfered to a purchaser in good faith and for valuable consideration, the proviso to s 340(3) applies and the registered title in the name of such a purchaser becomes indefeasible. See *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 (FC), which was a case where the protection afforded by the proviso to s 340(3) to a subsequent bona fide purchaser for value applied. There, Doshi was previously the registered owner of the land. He borrowed from Chooi Mun Sou RM130,000 and he deposited with Chooi (as collateral security for repayment of the loan) the document of title of the land together with a blank transfer form which was executed by him as transferor. The loan (which carried interest) was to be repaid within three months. When Doshi failed to repay the loan, Chooi transferred the land to Equitable Nominees

Sdn Bhd which subsequently sold the land to Yeoh Tiong Lay who became the subsequent registered proprietor of the land. A

Gill CJ (Malaya), with whom Raja Azlan Shah and Wan Suleiman FJJ agreed, said (at p 87):

> Turning next to the merits of the case, the learned judge took the view that as the plaintiff [Yeoh Tiong Lay] was for the time being the registered proprietor B
> of the premises, for his title to be defeated under s 340(2)(a) of the National Land Code, the onus was on the defendant [Doshi] to show that the plaintiff was a party or privy to fraud either by Chooi Mun Sou in transferring the land to the Nominee Company or by the Nominee Company in transferring the land to the plaintiff. In this connection he found that no particulars of fraud had been set out in the defence which merely alleged that at the time of the C
> sale of the premises to him the plaintiff had knowledge of the illegality of the loan agreement and notice that the instrument of transfer from Chooi Mun Sou to the Nominee Company was void. Proceeding upon the premises that the plaintiff was an independent and bona fide purchaser not bound by any special relationship to either Chooi Mun Sou or the Nominee Company, he found that the defendant had failed to satisfy the court that he had a *prima facie* D
> defence. He also found that the defendant had failed to provide any evidence to show that the plaintiff had not acted in good faith when he caused himself to be registered as proprietor.

The Chief Justice concluded thus (at pp 88, 89):

> ... Assuming that the loan agreement was illegal so that for that reason the E
> transfer from Chooi Mun Sou to Equitable Nominees was void, and assuming that that transfer was also void because of the falsity of the attestation clause, registration of the transfer from Equitable Nominees to the respondent [Yeoh Tiong Lay] was effective to vest title in him as a registered proprietor *notwithstanding that he acquired his interest under an instrument that was void.* See *Frazer v Walker* [1967] 1 All ER 649. (Emphasis added.)

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In other words, even assuming that the title of Equitable Nominees as the immediate proprietor was defeasible for fraud (under s 340(2)(a)) or because it was obtained by a void instrument (under s 340(2)(b)), since its registration was not invalidated before it was transferred to Yeoh Tiong Lay (a subsequent bona fide purchaser for value), the title of Yeoh Tiong Lay was protected by the proviso to s 340(3) of the Code. It was unfortunate G that Gill CJ should have placed reliance on the New Zealand case of *Frazer v Walker* [1967] 1 AC 569 in order to support the statement which I have underlined in his judgment. But, Yeoh did not acquire his title under an instrument that was void. Yeoh, in fact, had acquired the title as a subsequent purchaser in good faith and for valuable consideration. In other H
words, Yeoh had acquired his title to the land by deferred indefeasibility. The Federal Court had applied the wrong judicial authority, ie *Frazer v Walker*, to support their judgment when all the time they could have supported it by applying the proviso to s 340(3). In other words, the decision of the Federal Court was right but for the wrong reason. See Gopal Sri Ram JCA in *Boonsom Boonyanit* where he said, at pp 85–86: I

> It follows from what we have said in the preceding paragraph ... that s 340 is constructed in such a fashion as to make defeasible only the title of the immediate acquirer of the land. The section, however, protects a [subsequent]

purchaser who, in good faith and for valuable consideration, acquires title to land [in which case his title will be indefeasible: see the proviso to s 340(3)]. It also protects the successors in title of such a purchaser. In our judgment, the words 'any purchaser' appearing in the proviso to s 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second subsection to s 340 of the Code. Any other construction, would, in our view, denude sub-s (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come onto the register after him, take title free of any taint.

The facts

Ng See Chow is the current registered proprietor of the land. He has charged the land to the appellant OCBC Bank (M) Bhd. The respondent in this appeal is the Registrar of Titles. On 22 June 1993, the solicitors for the appellant received a Form 19A notice from the registrar informing them of the entry of a registrar's caveat under s 320(1)(a) of the National Land Code against the land. The appellant bank, as chargee, applied to the High Court citing the Registrar of Titles as respondent to set aside the registrar's caveat. The High Court dismissed the bank's application. Hence the appeal.

The registrar had relied on two documents at the time when he exercised his discretion under s 320(1)(a) of the National Land Code. One is a police report lodged by one Mr Ng Kim Hwa on 29 July 1990. In the report Mr Ng complained that on 29 July 1990 when he made a search at the land registry, he discovered that the land in which he is the registered proprietor had been transferred to a person by the name of Ng See Chow. He claimed that he had never executed any instrument of transfer of his land to this person by using his thumbprint on the instrument. In the instrument of transfer a thumbprint impression was imprinted on the document as the signature of the transferor. The other document is a report from the Central Registry of Criminals made under s 399 of the Criminal Procedure Code. In his report the Deputy Registrar of Criminals Malaysia and Singapore is of the view that the fingerprint on the document of transfer which he had examined and compared with the fingerprints of other related documents were not from the same person.

Application of the law to the facts of the present case

If the registration of the transfer of the title of the property to Ng See Chow was obtained by forgery of the instrument of transfer by the use of another person's thumbprint and not that of the true proprietor of the land Mr Ng Kim Hwa, then the registered title presently in the name of Ng See Chow is defeasible under s 340(2)(b) of the National Land Code (*Boonsom Boonyanit*). The true owner (Mr Ng Kim Hwa) could apply to invalidate the registration in Ng See Chow's name and to restore Mr Ng Kim Hwa to the register as proprietor. In fact, there is an action pending in the High Court

in which Mr Ng Kim Hwa has applied to set aside the registration of the title in the name of Ng See Chow and for Mr Ng Kim Hwa's name to be restored on the register as registered proprietor. A

In the instant case, the registered title of Ng See Chow as proprietor of the land in question is rendered defeasible (meaning, capable of annulment; see the Concise Oxford Dictionary) by forgery (if proved) under s 340(2)(b) and that makes the registration of the title in his name liable to be invalidated (annulled) at the instance of Mr Ng Kim Hwa. B

Section 340(1) insofar as it is material to the instant case reads:

> The title ... of any person ... for the time being registered as proprietor of any land ... shall, subject to the following provisions of this section, be indefeasible. C

This means that subject to the provisions of s 340(2) and (3), the registered title of Ng See Chow shall be indefeasible (that is to say, it cannot be lost: see the *Concise Oxford Dictionary*).

Section 340(2) insofar as it is applicable to the instant case reads: D

> The title ... of any such person ... shall not be indefeasible —
>
> (a) ...
>
> (b) where registration was obtained by forgery, ...
>
> (c) ... .

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In other words, s 340(2)(b) makes the registered title of Ng See Chow defeasible (meaning, capable of annulment) and that makes it liable to be annulled at the instance of Mr Ng Kim Hwa if the registration of the title in his (Ng See Chow's) name as proprietor was obtained by forgery.

The result is this. If the registered title of the land in Ng See Chow's name is defeasible under s 340(2)(b) because its registration was obtained by forgery, it (ie the registered title in the name of Ng See Chow) is liable to be annulled by the true registered owner Mr Ng Kim Hwa (*Boonsom Boonyanit*). This is because a forged instrument is a nullity. It is void and of no effect. And, as a consequence, the setting aside of Ng See Chow's title to the land will also make the charge, which Ng See Chow had created by using his defective title to charge the interest in the land (which is not Ng See Chow's in the first place) to the appellant bank (OCBC Bank (M) Bhd), similarly liable to annulment. This is because a forged instrument is a nullity, incapable of conferring any right, interest or title in favour of the acquirer of immovable property, which in this case is Ng See Chow. And, if Ng See Chow had no right, interest or title in the land then, he had nothing that was his to charge to the appellant. F G H

Gopal Sri Ram JCA put it aptly when he said in *Boonsom Boonyanit* at p 85:

> ... If, on the facts of a given case, it is demonstrated to the satisfaction of the court that the particular instrument was forged, or was, for some other reason, insufficient or void, then, the title of the registered proprietor may be set aside. I
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> ...

> ... it is axiomatic that a forged instrument is null and void and of no effect (see *Kreditbank Cassel GMBH v Schenkers Ltd* [1927] 1 KB 826 at p 834, per Bankes LJ). It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. ...

And further down the page, he said:

> ... Defeasibility is occasioned in this instance because a forged instrument is a nullity, incapable of conferring any right, interest or title in favour of the acquirer of immovable property.

So that, since a forged instrument (such as a forged transfer) is a nullity, it does not confer any right or title to the land. A person who has no right or title to the land has no right to charge it because the land is not his, in the first place, for him to grant any interest (like a charge or a lease) in the land to someone else (such as a chargee or a lessee).

In *Quah Hong Lian Neo v Seow Teong Teck & Ors* [1936] MLJ 161, the headnote reads:

> The original plaintiff, Tan Keng Neo was the executrix and the devisee in trust [for] Seow Eng Tin deceased and, as such, was registered as proprietor [and] representative of the lands comprised in Johore Grants 12364 and 12365. The first defendant obtained possession of the titles by a trick. He procured a woman to impersonate Tan Keng Neo and to execute a forged transfer of the lands to himself. Immediately thereafter he, purporting to act as registered proprietor, executed a first charge in favour of the second defendant to secure advances on current account. Thereafter this transfer and first charge were registered. Subsequently the 1st defendant executed a second charge to the second defendant to secure further advances, and this charge also was registered. Subsequently the 1st defendant executed a third charge to the 3rd defendant to secure advances on current account. ... This also was registered.
>
> The first defendant absconded.
>
> The first defendant proved that he had given value for [the] charge bona fide and without notice of the fraud.
>
> ...
>
> The original plaintiff, having discovered the frauds, brought suit claiming inter alia to have the forged transfer and the three charges ... set aside and to have the register rectified. She died during the hearing, and the suit was carried on by her successor, the substituted plaintiff.
>
> Held, the plaintiff was entitled to succeed.
>
> (1) ...
>
> (2) The forged transfer to the first defendant was a nullity: *Gibbs v Messer* [1891] App Cas 257 followed.
>
> (3) As the first defendant obtained no rights by virtue of the forged transfer, he had no rights, by reason of the maxim Nemo dat quod non habet, to hand on to the chargees. Therefore the charges were nullities, at any rate so far as they affected the land supposed to be charged.

And this is how Mills J at p 167, put it way back in 1936:

As I understand it, the position is as follows:

A. The forged transfer to Seow Teong Teck is a nullity: in England a forged transfer is void at common law (cf *Gibbs v Messer* [1891] App Cas at p 257); in the Federated Malay States it is a nullity (cf Innes *A Short Treatise on Registration of Title in the Federated Malay States*, at p 91); I have no hesitation in holding that the same rule applies in Johore.

B. As Seow Teong Teck obtained no rights by virtue of the forged transfer, he had no rights, by reason of the maxim *nemo dat quod non habet*, to hand on to the chargees: therefore the charges, at any rate so far as they affect the land supposed to be charged, are a nullity.

My conclusion is that in the present case the court ought to hold that the Charges are a nullity.

It is important to stress and to imprint on one's mind that s 340(3), which will be discussed below, does not apply at this stage. That subsection will only be applicable after the immediate proprietor or holder has transferred his title or interest (which is defeasible by circumstances set out in s 340(2)) to another person.

Section 340(3) and its proviso do not apply to s 340(2)

In order to understand and appreciate the effect of s 340(3) and the proviso to this subsection, it is useful to be reminded by these words (of Gopal Sri Ram JCA) in *Boonsom Boonyanit* at p 84:

> First, we are of the opinion that the proper approach is to interpret s 340 of the Code as a whole, uninfluenced by any judicial or academic comment upon its effect. ...

Section 340(3), insofar as it is material to the instant case, reads:

> Where the title or interest of any person ... is defeasible by reason of any of the circumstances specified in subsection (2) —
>
> (a) it shall be *liable to be set aside in the hands of any person* or body to *whom* it may *subsequently* be *transferred*; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;
>
> Provided that nothing in *this subsection* shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. (Emphasis added.)

What it means is this: Where a registered title or interest is rendered defeasible by reason of any of the circumstances specified in s 340(2), the title (in the hands of any person) to whom it is subsequently transferred may still be liable to be set aside under s 340(3)(a) and any interest (for example, any charge or lease) subsequently granted thereout by the subsequent proprietor or holder in s 340(3)(a) is also liable to be set aside under s 340(3)(b). This is because the grantee in such a case is a person in whom the interest is for the time vested (see s 340(3)(b). However, if the subsequent proprietor or holder in s 340(3)(a) is a purchaser in good faith

A and for value his title or interest will be indefeasible because the proviso to s 340(3) will then apply to him.

For example, see *Doshi v Yeoh Tiong Lay*. Doshi was the previous registered owner. He borrowed from Chooi Mun Sou RM130,000 and he deposited with Chooi the document of title of his land together with a blank B transfer form which he had signed as transferor. When Doshi failed to repay the loan when it became due, Chooi transferred the land to Equitable Nominees Sdn Bhd which subsequently sold it to Yeoh Tiong Lay who became the subsequent registered proprietor of the land. In that case even assuming the title of the immediate proprietor Equitable Nominees was defeasible under s 340(2), it was transferred to a subsequent purchaser C Yeoh (see s 340(3)(a)). In such a case the title which is now in the hands of the subsequent purchaser Yeoh would still be liable to be set aside (under sub-s (3)(a)) unless it is protected by the proviso to sub-s (3). In that case, Yeoh was protected by the proviso to s 340(3), he being a purchaser in good faith and for valuable consideration.

D We must reiterate that the proviso to s 340(3) applies exclusively to those situations which are covered by sub-s (3) which is that s 340(3) will only take effect after the immediate registered proprietor or holder in s 340(2) has transferred his defeasible title or interest to someone else (see s 340(3)(a)).

Is there then any difference between the two sets of situations in E s 340(2) and s 340(3)? The difference is this: In s 340(2) where a registered title or interest is rendered defeasible by reason of any of the circumstances set out in s 340(2), that title or interest in the hands of the immediate registered proprietor or holder of an interest (for example, any charge or lease) is liable to be set aside. And any interest granted by such immediate F proprietor or holder is also liable to be set aside. In effect, s 340(2)(a) and (b) affect the immediate proprietor, chargee or lessee even if he be a purchaser for value under sub-s (2)(a), or, an innocent purchaser for value under sub-s (2)(b). It is important to be reminded that there is no proviso to this subsection.

On the other hand, s 340(3) applies only to a situation after the G immediate registered proprietor or holder in s 340(2) has transferred his defeasible title or interest to someone else. The result will be virtually the same in s 340(3) as in s 340(2) but for one important difference. Under s 340(2) the title or interest in the hands of the immediate registered proprietor or holder of an interest in the land (such as a charge or a lease) is liable to be set aside. But, in s 340(3) although the title or interest which H is in the hands of the subsequent purchaser is also liable to be set aside, the subsequent purchaser has the benefit of the protection of the proviso to sub-s (3) which the immediate proprietor or holder in s 340(2) does not have.

Now, if we apply this to the facts of the present case, what we have is I this. If the registered title of the land (which is in Ng See Chow's name) is defeasible under s 340(2)(b) because its registration was obtained by forgery, it (ie Ng See Chow's title) is liable to be set aside at the instance of

the true owner Mr Ng Kim Hwa (even though Ng See Chow was an innocent purchaser for value) and any interest (for example, any charge or lease) granted by Ng See Chow is similarly liable to be set aside. This is because in s 340(2) there is no proviso (as there is in s 340(3)) to protect the innocent purchaser (who is the immediate acquirer) for value or to protect anyone claiming through or under the immediate acquirer (even though that person be an innocent purchaser for value). So that, the charge which Ng See Chow has granted thereout to the appellant bank (OCBC Bank (M) Bhd) as chargee is not protected because there is no proviso in sub-s (2) to protect the chargee bank which is a person claiming through or under Ng See Chow. The charge, therefore, is also liable to be set aside by Mr Ng Kim Hwa.

In order to explain the point further, I wish to quote from Teo Keang Sood and Khaw Lake Tee at p 191:

> ... By way of illustration, take for instance a case where B fraudulently transferred to himself a piece of land which belonged to A. By virtue of s 340(2)(b), B's title is liable to be set aside at the instance of A on the ground of fraud [forgery]. Assuming that B transfers the same piece of land to C, C's title is also liable to be set aside by A [under s 340(3)(a)] and so is any interest, for example any charge or lease, granted by C [under s 340(3)(b)] unless C is a purchaser in good faith and for value [see the proviso to s 340(3)] in which case his title or interest will be indefeasible. ...

That, in a nutshell, is how the learned authors have neatly summarized by way of an example what I have tried to explain in this judgment.

Conclusion

In view of what we have said above, we are of the opinion that the registrar had more than ample grounds for him to exercise his discretion under s 320(1) of the National Land Code when he entered his registrar's caveat.

Abdul Malek JCA: I have read the judgments in draft of my learned brothers NH Chan and Mokhtar Sidin JJCA and, being in total agreement with the reasoning and conclusions therein, have nothing to add.

Mokhtar Sidin JCA: This is an appeal by the appellant who was the applicant in the court below against the decision of the learned judicial commissioner who dismissed the appellant's application to remove the registrar's caveat. The appellant is a limited liability company incorporated in Singapore and conducting banking business at the relevant time in 108-2, Jalan Rahmat, Batu Pahat. By an originating motion dated 19 August 1993 the appellant applied to the court to remove the registrar's caveat vide Form 19A dated 22 June 1993 on the document of title to the land held under Certificate of Title No 11736A, Lot No 1880, Bandar Penggaram, Batu Pahat, Johor ('the said land').

In an affidavit affirmed by Lee Nyit Min on behalf of the appellant it was stated that on or about 8 June 1988, one Ng See Chow, the registered proprietor of the said land in order to secure an overdraft facility granted by

A the appellant to him, executed a memorandum of charge on the said land in favour of the appellant. At that time Ng See Chow was trading as JS Trading Co. The memorandum of charge was registered on or about 14 June 1988. By an Originating Summons No 24-40-1991, the appellant commenced foreclosure proceeding when the said Ng See Chow failed to pay the overdraft facility given. On 12 May 1992 the court granted the order B for sale. On 15 September 1992 the respondent entered a registrar's caveat ('the first caveat') on the said land. Apparently the caveat was entered at the request of the police because of an investigation on a report lodged by Ng Kim Hwa. The said Ng Kim Hwa in the report claimed that the said land belonged to him as evidenced in the title when his name was shown as the C previous registered proprietor that was before the name of Ng See Chow. The said Ng Kim Hwa claimed that he had not executed any transfer form (Form 14A) in favour of Ng See Chow in respect of the said land. On 3 February 1993, by consent of the respondent the first caveat was removed.

D In the meantime Ng Kim Hwa had commenced proceedings against Ng See Chow and the appellant in the Muar High Court vide Civil Suit No 22(23)-10-92 claiming the said land from them. When we heard the appeal it appeared that the suit was still pending and had not been disposed of yet. Ng Kim Hwa applied and succeeded in obtaining an order on 4 July 1992 to intervene in this foreclosure proceedings. The said Ng Kim Hwa E then applied to set aside the order for sale or to stay the execution of the order for sale pending the outcome of the civil suit filed by him. The appellant resisted the application to set aside the order for sale by the said Ng Kim Hwa, and contended that the charge created in favour of the appellant on the said land was indefeasible in the light of s 340 of the National Land Code as the appellant had obtained the same in good faith F and for valuable consideration. On 16 January 1993, the Muar High Court dismissed the application to set aside the order for sale by Ng Kim Hwa and fixed 24 June 1993 as the date of sale of the said land. Ng Kim Hwa did not appeal against that decision.

Acting on that decision, the appellant then took the necessary steps to G proceed with the auction on the said land including the directions for the sale. Preparations for the auction, such as the advertising and distribution of the proclamation of sale, had been effected. Two days before the date appointed for the sale, ie on 22 June 1993, the solicitors for the appellant received a notice in Form 19A of the entry of a Registrar's caveat ('the second caveat') on the said land. From the record it appears that the second H caveat was entered on the same ground as the first caveat. The ground was that Form 14A was not executed by the said Ng Kim Hwa. On 23 June 1993, the solicitors for the appellant wrote to the respondent for the removal of the second caveat. On 21 July 1993, the solicitors for the appellant received from the respondent a letter stating that the respondent refused to remove the second caveat. It was also stated in that letter that the I second caveat was entered based on letters from the Pusat Pendaftaran Penjenayah Malaysia. When the respondent refused to remove the second caveat the appellant took out the present originating motion to remove the

second caveat. The High Court dismissed the appellant's application and hence the present appeal.

The affidavit in reply of the respondent dated 5 January 1994 was affirmed by Jama bin Johan. It was stated in that affidavit that the second caveat was necessary on the following grounds:

(a) Police Report No 4351/92 lodged by Ng Kim Hwa;

(b) police investigation on that report;

(c) report dated 11 September 1992 from the Deputy Registrar of Criminals, Malaysia and Singapore, Bukit Aman, Kuala Lumpur; and

(d) report dated 5 January 1993 from Examiner of Documents Malaysia, Petaling Jaya.

The affidavit went on to say that the right thumb print found in Form 14A was not the right thumb print of Ng Kim Hwa and it is the respondent's duty under s 320(1)(a) of the National Land Code to retain the status quo pending the outcome of Civil Suit No 22(23)-10-1992.

It is to be noted that the said Ng Kim Hwa did not ask the second caveat to be entered. He only lodged a police report that he did not execute Form 14A upon which the transfer and the registration in the name of Ng See Chow took place. It was based on this report and the grounds stated above the first caveat was entered. It is clear to us that except for ground (d) the rest of the grounds were already in the possession of the respondent. Thus when the second caveat was entered it was on the report lodged.

It is the contention of the appellant that the entry of the second caveat by the respondent was wrongful and/or unreasonable and/or did not take into account all relevant matters and/or irrelevant matters. Counsel for the appellant also contended that the entry of the second caveat had prejudiced and affected the rights of the appellant to enforce the said charge which was to proceed with the public auction of the said land as ordered by the court.

It is not disputed that the second caveat was entered under s 320(1)(a) of the National Land Code which provides as follows:

> Circumstances in which Registrar's caveats may be entered
>
> (1) Subject to subsection (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to be necessary or desirable —
>
> (a) for the prevention of fraud or improper dealing; or ... .

From the facts it is clear to us that the second caveat was entered as the respondent was of the view that the second caveat is necessary or desirable for the prevention of fraud.

Learned counsel for the appellant contended that s 340 of the National Land Code gave the appellant an indefeasible charge of the said land because when the charge was created the appellant had no knowledge of the fraud. As such the appellant was on the same footing as a bona fide purchaser when the charge was created. For that reason it was contended that the second caveat should be disabled. Section 340 of the National Land Code provides as follows:

A Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

B

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an C insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —

D

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

E Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent —

(a) the exercise in respect of any land or interest of any power of F forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

We gave our decision after hearing the arguments and submissions on both sides. Relying on the decision of the Court of Appeal in *Boonsom Boonyanit* G *v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62, we dismissed the appeal by the appellant and confirmed the decision of the learned Judicial Commissioner. In *Boonsom Boonyanit*, the appellant was a Thai national who owned property in Penang. An unknown person, claiming to be the appellant, procured a certified true copy of the appellant's land title from H the National Land Registry by claiming to have lost the original documents and subsequently procured a forged passport in the appellant's name and duly sold the property to the respondent for valuable consideration. The appellant discovered the ruse but only after the respondent was registered as owner of the property. The appellant sued the respondent in order to have her name restored on the register as the owner of the property. The I respondent argued that as an innocent third party purchaser for value, its title was indefeasible notwithstanding the forged signature on the memorandum of transfer and relied on s 340 of the National Land Code. The High Court ruled in favour of the respondent. On appeal, the Court of

Appeal allowed the appeal. It was held that the words 'any purchaser' in s 340 of the National Land Code refers to a subsequent and not to an immediate purchaser, hence creating a deferred indefeasibility which benefits subsequent purchasers. The title of an immediate purchaser is defeasible if tainted by one or more of the situating elements set out in s 340(2) but creates an exception in favour of a bona fide purchaser who takes his title from such a registered proprietor. This bifurcation makes it clear that Parliament intended to confer deferred and not immediate indefeasibility. The Court of Appeal held that the trial judge had erred in his reliance upon the case of *Frazer v Walker* [1967] 1 AC 569 which turned upon the construction of a particular New Zealand provision which is fundamentally different in wording from s 340 of the Code. It went on to say that on a proper construction of s 340, a registration obtained by forgery is of no effect. When s 340 is read as a whole and in context with ss 292 and 304 of the Code, it is clear that there can be no registration without an instrument. Hence, one of the ways in which to defeat a registration is by impugning the very instrument of transfer by means of which the registered proprietor obtained his title. If the instrument was forged or by other reason was insufficient or void, the title of the registered proprietor may be set aside. The Court of Appeal then set aside the learned judge's decision and restored the registered proprietorship to the appellant and set aside the registration of the respondent as the proprietor.

We have given the order that the appeal be dismissed with costs and the deposit to be paid to the respondent towards account of taxed costs. The order of the High Court is confirmed.

Appeal dismissed.

Reported by Joel Ng